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16 UNITED STATES DISTRICT COURT  
17 SOUTHERN DISTRICT OF CALIFORNIA

18 JUNE HIGGINBOTHAM and JENNIFER  
19 RED, on Behalf of Themselves and All Others  
20 Similarly Situated,

21 Plaintiffs,

22 v.

23 KELLOGG COMPANY and KELLOGG  
24 SALES CO.,

25 Defendants.

Case No.

10 CV - 255

MMA WVG

CLASS ACTION

**COMPLAINT FOR VIOLATIONS OF  
THE LANHAM ACT,  
UNFAIR COMPETITION LAW,  
COMMON LAW OF UNFAIR  
COMPETITION, FALSE  
ADVERTISING LAW, AND  
CONSUMER LEGAL  
REMEDIES ACT**

DEMAND FOR JURY TRIAL

1           Plaintiffs June Higginbotham and Jennifer Red ("Plaintiffs"), on behalf of themselves, all  
 2 others similarly situated, and the general public, by and through undersigned counsel, hereby sue  
 3 Defendants Kellogg Company and Kellogg Sales Co. (collectively referred to herein as  
 4 "Kellogg") and, upon information and belief and investigation of counsel, allege as follows:

### 5                                   **JURISDICTION AND VENUE**

6           1.       This Court has original jurisdiction over this action under 28 U.S.C. §1331 and 15  
 7 U.S.C. §1121.

8           2.       This Court also has original jurisdiction under 28 U.S.C. §1332(d)(2) (The Class  
 9 Action Fairness Act) because the matter in controversy exceeds the sum or value of \$5,000,000  
 10 exclusive of interest and costs and more than two-thirds of the members of the Class reside in  
 11 states other than the state of which Defendants are citizens.

12          3.       Venue is proper in this Court pursuant to 28 U.S.C. §1391 because Plaintiffs  
 13 reside in and suffered injuries as a result of Kellogg's acts in this district, many of the acts and  
 14 transactions giving rise to this action occurred in this district, and Kellogg (1) is authorized to  
 15 conduct business in this district and has intentionally availed itself of the laws and markets of  
 16 this district through the promotion, marketing, distribution, and sale of its products in this  
 17 district; (2) resides in this district; and (3) is subject to personal jurisdiction in this district.

### 18                                   **INTRODUCTION**

19          4.       Plaintiffs June Higginbotham and Jennifer Red repeatedly purchased packaged  
 20 food products described herein made by Kellogg during the class period defined herein.

21          5.       Kellogg's "Nutri-Grain Bars" are labeled "More of the Whole Grains Your Body  
 22 Needs" and "Excellent Source of Calcium."

23          6.       Nutri-Grain Bars, however, also contain artificial trans fat.

24          7.       Absent these material deceptions, misstatements, and omissions described herein,  
 25 Plaintiffs and other Class members would not have purchased these Kellogg products.

26          8.       Plaintiffs seek an order that compels Kellogg to (1) cease marketing its products  
 27 using the misleading tactics complained of herein, (2) conduct a corrective advertising campaign,  
 28 (3) restore the amounts by which Kellogg was unjustly enriched, (4) destroy all misleading and  
 29 deceptive materials and products, and (5) compensate Plaintiffs and the Plaintiff Class for  
 30 purchasing and consuming these products.

### 31                                   **PARTIES**

32          14.       Defendant Kellogg Company is a Delaware corporation with its principal place of

1 business in California. Kellogg Company owns and controls Defendant Kellogg Sales Co.

2 15. Defendant Kellogg Sales Co. is a Delaware corporation with its principal place of  
3 business in California.

4 16. Defendants are the manufacturers of Keebler Fudge Shoppe Grasshopper  
5 Cookies, Keebler Fudge Shoppe Cookies 'n Crème, Keebler Chip Deluxe Cookies, Keebler  
6 Sandies Shortbread Cookies, and Nutri-Grain Bars.

7 17. Plaintiffs are residents of San Diego and Los Angeles Counties who repeatedly  
8 purchased Kellogg products in various California stores during the class period defined below.

9 **SUMMARY OF THE STRONG EVIDENCE OF HEALTH**  
10 **DANGERS OF ARTIFICIAL TRANS FAT**

11 **Artificial trans fat is a manufactured food product whose basic chemical structure is**  
12 **different from natural fat molecules.**

13  
14 18. Trans fat is naturally found in trace amounts in foods derived from ruminant  
15 animals, primarily in red meat.<sup>1</sup>

16 19. Also known as vaccenic acid, natural trans fat has never been linked to any  
17 negative health effect in human beings and is chemically different than artificial trans fat.

18 20. Initial studies on rats indicate that consumption of vaccenic acid is beneficial to  
19 health.<sup>2</sup>

20 21. Artificial trans fat is manufactured in an industrial process called hydrogenation,  
21 in which hydrogen atoms are added to normal vegetable oil by heating the oil to temperatures  
22 above 400 degrees Fahrenheit in the presence of ion donor catalyst metals such as rhodium,  
23 ruthenium, and nickel.<sup>3</sup>

24 22. Nearly all the trans fat in the U.S. diet is the artificial fat present in partially  
25 hydrogenated vegetable oil ("PHVO").<sup>4</sup>

26  
27 <sup>1</sup> Dariush Mozaffarian *et al.*, *Trans Fatty Acids and Cardiovascular Disease*, 354 New Eng. J.  
28 Med. 1601, 1608 (2008).

29 <sup>2</sup> Ye Wang *et al.*, *Trans-11 Vaccenic Acid Dietary Supplementation Induces Hypolipidemic*  
30 *Effects on JCR:LA-cp Rats*, 138 J. Nutrition 2117 (November 2008).

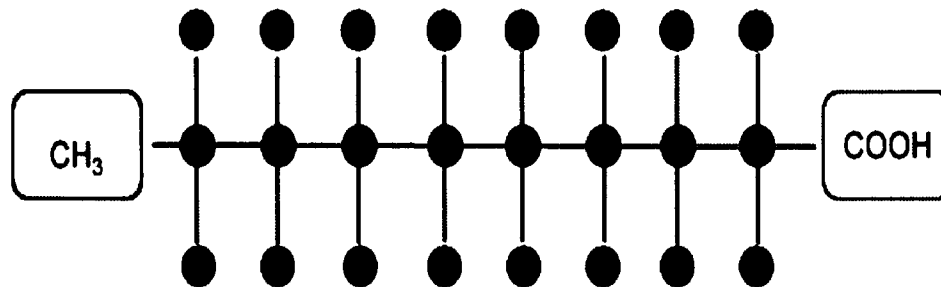
31 <sup>3</sup> See Alice H. Lichtenstein, *Trans Fatty Acids, Plasma Lipid Levels, and Risk of Developing*  
32 *Cardiovascular Disease*, 95 Circulation 2588, 2588-90 (1997).

<sup>4</sup> See Mozaffarian, 354 New Eng. J. Med. at 1608.

23. PHVO was invented in 1901 and patented in 1902 by German chemist Wilhelm Normann. Trans fat molecules chemically differ from the natural fat molecules in other food products, as shown in the illustrations that follow.

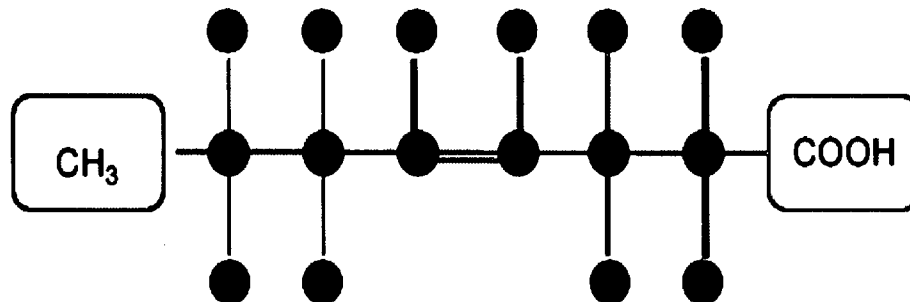
24. Natural fat, except the trace amounts of natural trans fat from ruminant animals, comes in two varieties: (1) fats that lack carbon double bonds ("saturated fat") and (2) fats that have carbon double bonds with the hydrogen atoms on the same side on the carbon chain ("cis fat"). Trans fat, however, has double bonds on opposite sides of its carbon chain.

Saturated fat

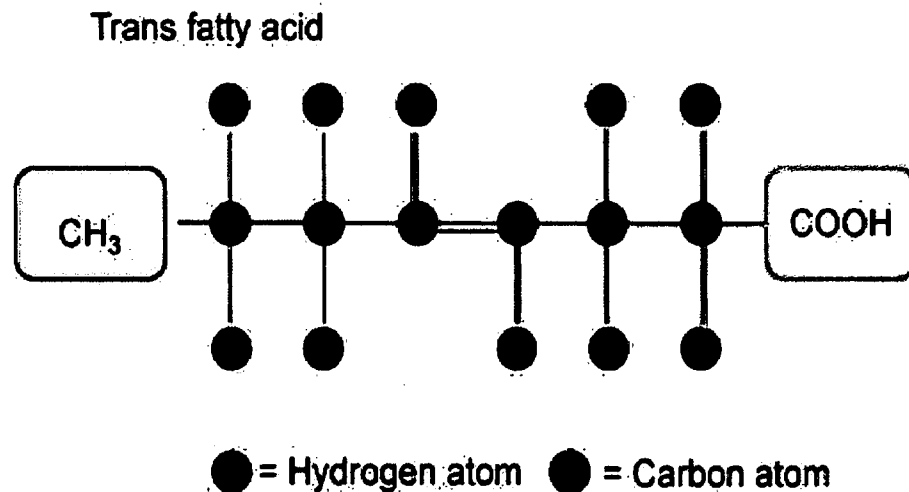


● = Hydrogen atom    ● = Carbon atom

Cis fatty acid



● = Hydrogen atom    ● = Carbon atom



25. PHVO was initially a “wonder product” very attractive to the packaged food industry because it combines the low cost of unsaturated cis fat with the flexibility and long shelf life of saturated fat. Like cis fat, PHVO is manufactured from lower-cost legumes,<sup>5</sup> while saturated fat is derived from relatively expensive animal and tropical plant sources.<sup>6</sup>

26. Like natural saturated fat, PHVO has a long shelf life, physical solidity, and flavor stability. The industrial process that adds hydrogen ions to normal vegetable oil improves food texture and permits food products to withstand heavy mechanical processing and high temperatures.<sup>7</sup> Given its versatility, PHVO was recently used in 40 percent of processed packaged foods.<sup>8</sup>

27. Artificial trans fat does not exist in nature, and the human body has not evolved to digest it. The same unusual and unnatural chemical structure that gives artificial trans fat properties attractive from an industrial perspective makes it highly toxic to human health.

**Trans fat causes cardiovascular disease, type 2 diabetes, and cancer.**

<sup>5</sup> e.g., corn oil, soybean oil, peanut oil

<sup>6</sup> e.g., butter, cream, tallow, coconut oil

<sup>7</sup> See Alberto Ascherio *et al.*, *Trans Fatty Acids & Coronary Heart Disease*, 340 New Eng. J. Med. 94, 94-8 (1999). See also Ctr. for Food Safety & Applied Nutrition, U.S. Food & Drug Admin., Questions & Answers About Trans Fat Nutrition Labeling (Update 2006) (2003), available at <http://www.cfsan.fda.gov/%7Edms/qatrans2.html#fn>.

<sup>8</sup> Mary Carmichael, *The Skinny on Bad Fat*, Newsweek, Dec. 1, 2003, at 66. See also Kim Severson, *Hidden Killer. It's Trans Fat. It's Dangerous. And It's In Food You Eat Every Day*, S.F. Chron., Jan. 30, 2002.

1 • **Heart Disease**

2 28. In a joint Dietary Guidelines Advisory Committee Report, the U.S. Department of  
3 Health and Human Services and the U.S. Department of Agriculture recognized “[t]he  
4 **relationship between trans fatty acid intake and LDL cholesterol is direct and progressive,**  
5 **increasing the risk of cardiovascular disease.”**<sup>9</sup>

6 29. Food products with trans fat harm the heart by “rais[ing] the concentration of the  
7 most dangerous form of serum cholesterol (LDL cholesterol)” and “lower[ing] a protective form  
8 of serum cholesterol (HDL cholesterol).”<sup>10</sup>

9 30. The American Heart Association notes “**trans fats raise your bad (LDL)**  
10 **cholesterol levels and lower your good (HDL) cholesterol levels. Eating trans fats increases**  
11 **your risk of developing heart disease.”**<sup>11</sup>

12 31. After an extensive evaluation of the scientific literature on the trans fat/CHD  
13 connection, the FDA concluded:

14 ...based on the consistent results across a number of the most persuasive types of  
15 study designs (i.e., intervention trials and prospective cohort studies) that were  
16 conducted using a range of test conditions and across different geographical  
17 regions and populations...the available evidence for an adverse relationship  
18 between trans fat intake and CHD risk is strong.<sup>12</sup>

19 32. Trans fat raises the risk of CHD more than any other known nutritive product.<sup>13</sup>

20 33. Removing 2% of daily calories from trans fat from the American diet “would  
21 prevent approximately 30,000 premature coronary deaths per year, and epidemiologic evidence  
22 suggests this number is closer to 100,000 premature deaths annually.”<sup>14</sup>

23 34. A study on the impact of trans fatty acids on heart health provides evidence that:

24 <sup>9</sup> Dep’t of Health & Human Serv. & U.S. Dep’t of Agric., 2005 Dietary Guidelines Advisory  
25 Committee Report, Section 10 (2005).

26 <sup>10</sup> *Id.*

27 <sup>11</sup> Am. Heart Ass’n., *Trans Fat Overview*, available at  
28 <http://www.americanheart.org/presenter.jhtml?identifier=3045792>.

29 <sup>12</sup> Ctr. for Food Safety & Applied Nutrition, U.S. Food & Drug Admin., Questions & Answers  
30 About Trans Fat Nutrition Labeling.

31 <sup>13</sup> Mozaffarian, 354 New Eng. J. Med. at 1603.

32 <sup>14</sup> Alberto Ascherio *et al.*, *Trans Fatty Acids & Coronary Heart Disease*, 340 New Eng. J. Med.  
94, 94-8 (1999).

1 [E]ven the lower estimates from the effects [of PHVO] on blood lipids would  
 2 suggest that more than 30,000 deaths per year may be due to the consumption of  
 3 partially hydrogenated vegetable fat. Furthermore, the number of attributable  
 4 cases of nonfatal coronary heart disease will be even larger.<sup>15</sup>

5 35. Since “the adverse effect of trans fatty acids is stronger than that of saturated fatty  
 6 acids,” saturated fat consumption would need to be reduced by 10 percent of caloric intake to  
 7 have the same impact.<sup>16</sup>

8 36. “10 to 19 percent of CHD events in the United States could be averted by  
 9 reducing the intake of trans fat.”<sup>17</sup>

10 37. By raising LDL levels and lowering HDL levels, trans fat causes a wide variety of  
 11 dangerous heart conditions, including low flow-mediated vasodilation, coronary artery disease,  
 12 and primary cardiac arrest.

13 38. After conducting a crossover diet trial, Danish researchers determined that healthy  
 14 men and women who maintained a high-trans fat diet had 21 percent lower protective HDL  
 15 levels and 29 percent lower flow-mediated vasodilation (“FMD”) than those on a high-saturated  
 16 fat diet. Since FMD measures the percent increase between the diameter of the artery at ordinary  
 17 and at maximum dilation, low FMD is “a risk marker of coronary heart disease.”<sup>18</sup>

18 39. Australian researchers observed that heart attack patients possess elevated  
 19 amounts of trans fat in their adipose tissue, strongly linking heart disease with long-term  
 20 consumption of trans fat.<sup>19</sup>

21 40. By taking blood samples from 179 survivors of cardiac arrest and 285 randomly-  
 22 selected control patients and comparing the top fifth with the bottom fifth of participants by trans  
 23 fat intake, another study published in the American Heart Association’s *Circulation* found that  
 24 the largest consumers of trans fat have three times the risk of suffering primary cardiac arrest,

25 <sup>15</sup> W.C. Willett *et al.*, *Trans Fatty Acids: Are the Effects only Marginal?* 84 Am. J. Pub. Health  
 26 722, 723 (1994).

27 <sup>16</sup> Mozaffarian, 354 New Eng. J. Med. at 1609.

28 <sup>17</sup> See Mozaffarian, 354 New Eng. J. Med. at 1611.

29 <sup>18</sup> Nicole M. De Roos *et al.*, *Replacement of Dietary Saturated Fatty Acids by Trans Fatty Acids*  
 30 *Lowers Serum HDL Cholesterol and Impairs Endothelial Function in Healthy Men and Women*,  
 21 Am. Heart Assoc. 1233, 1233-37 (2001).

31 <sup>19</sup> Peter M. Clifton *et al.*, *Trans Fatty Acids In Adipose Tissue And The Food Supply Are*  
 32 *Associated With Myocardial Infarction*. 134 J. of Nutrition 874, 874-79 (2004).



1 even after controlling for a variety of medical and lifestyle risk factors.<sup>20</sup>

2 • **Diabetes**

3 41. Artificial trans fat causes type 2 diabetes.<sup>21</sup>

4 42. A 14-year study of 84,204 women found that for every 2 percent increase in  
5 energy intake from trans fat, the relative risk of type 2 diabetes was 1.39. In other words, each 2  
6 percent of calories from artificial trans fat increases the risk of type 2 diabetes by 39 percent.<sup>22</sup>

7 • **Cancer**

8 43. Trans fat is a known carcinogen shown to cause breast, prostate, and colorectal  
9 cancer.

10 44. A 13-year study of 19,934 French women showed 75 percent more women  
11 contracted breast cancer in the highest quintile of trans fat consumption than did those in the  
12 lowest.<sup>23</sup>

13 45. In a 25-year study of 14,916 U.S. physicians, the doctors in the highest quintile of  
14 trans fat intake had over a 100% greater risk of developing prostate cancer than the doctors in the  
15 lowest quintile.<sup>24</sup>

16 46. A study of 1,012 American males observing trans fat intake and the risk of  
17 prostate cancer found “[c]ompared with the lowest quartile of total trans-fatty acid consumption,  
18 the higher quartiles gave odds ratios (ORs) equal to 1.58,” meaning those in the highest quartile  
19 are 58% more likely to contract prostate cancer than those in the lowest.<sup>25</sup>

20 47. A 600-person study found an 86 percent greater risk of colorectal cancer in the  
21  
22

23  
24 <sup>20</sup> Rozenn N. Lemaitre *et al.*, *Cell Membrane Trans-Fatty Acids and the Risk of Primary Cardiac Arrest*, 105 *Circulation* 697, 697-701 (2002).

25 <sup>21</sup> Am. Heart Ass’n., *Trans Fat Overview*.

26 <sup>22</sup> Jorge Salmeron *et al.*, *Dietary Fat Intake and Risk of Type 2 Diabetes in Women*, 73 *Am. J. of Clinical Nutrition* 1019, 1023 (2001).

27 <sup>23</sup> Véronique Chajès *et al.*, *Association between Serum Trans-Monounsaturated Fatty Acids and Breast Cancer Risk in the E3N-EPIC Study*, 167 *Am. J. of Epidemiology* 1312, 1316 (2008).

28 <sup>24</sup> Jorge Chavarro *et al.*, *A Prospective Study of Blood Trans Fatty Acid Levels and Risk of Prostate Cancer*, 47 *Proc. Am. Assoc. of Cancer Research* 95, 99 (2006).

29 <sup>25</sup> Xin Liu *et al.*, *Trans-Fatty Acid Intake and Increased Risk of Advanced Prostate Cancer: Modification by RNASEL R462Q Variant*, 28 *Carcinogenesis* 1232, 1232 (2007).



1 highest trans fat consumption quartile.<sup>26</sup>

2 48. A 2,910-person study found “trans-monounsaturated fatty acids...were dose-  
3 dependently associated with colorectal cancer risk,” which showed “the importance of type of fat  
4 in the etiology and prevention of colorectal cancer.”<sup>27</sup>

5 49. The serious health conditions caused by trans fat consumption only occur from  
6 artificial trans fat, not the trace natural trans fat found in ruminant sources:

7 Of four prospective studies evaluating the relation between the intake of trans  
8 fatty acids from ruminants and the risk of CHD, none identified a significant  
9 positive association, whereas three identified nonsignificant trends toward an  
10 inverse association. ... [T]he sum of the current evidence suggests that the public  
11 health implications of consuming trans fats from ruminant products are relatively  
12 limited.<sup>28</sup>

13 **The grave, concrete risks of artificial trans fat consumption far outweigh any**  
14 **conceivable benefits of Kellogg’s conduct.**

15 50. There is no health benefit to artificial trans fat consumption and “no safe level” of  
16 trans fat intake.<sup>29</sup>

17 51. According to the established consensus of the scientific community, consumers  
18 should keep their consumption of trans fat “as low as possible.”<sup>30</sup>

19 52. As Dariush Mozaffarian, M.D., notes in the New England Journal of Medicine:  
20 [T]rans fats from partially hydrogenated oils have no intrinsic health value above  
21 their caloric value. Thus, from a nutritional standpoint, the consumption trans  
22 fatty acids results in considerable potential harm but no apparent benefit. ... Thus,  
23 complete or near-complete avoidance of industrially produced trans fat—a  
24 consumption of less than 0.5 percent of the total energy intake—may be necessary  
25 to avoid adverse effects and would be prudent to minimize health risks.<sup>31</sup>

26 <sup>26</sup> L.C. Vinikoor *et al.*, *Consumption of Trans-Fatty Acid and its Association with Colorectal*  
27 *Adenomas*, 168 Am. J. of Epidemiology 289, 294 (2008).

28 <sup>27</sup> Evropi Theodoratou *et al.*, *Dietary Fatty Acids and Colorectal Cancer: A Case-Control Study*,  
29 166 Am. J. of Epidemiology 181 (2007).

30 <sup>28</sup> Mozaffarian, 354 New Eng. J. Med. at 1608-1609.

31 <sup>29</sup> Food & Nutrition Bd., Inst. of Med., *Dietary Reference Intakes For Energy, Carbohydrate,*  
32 *Fiber, Fat, Fatty Acids, Cholesterol, Protein, and Amino Acids* (2005).

<sup>30</sup> Food & Nutrition Bd., Inst. of Med., *Dietary Reference Intakes For Energy, Carbohydrate,*  
*Fiber, Fat, Fatty Acids, Cholesterol, Protein, and Amino Acids* 424 (2005).

<sup>31</sup> Mozaffarian, 354 New Eng. J. Med. at 1609.

**Trans fat is so inherently dangerous that it is being banned in an increasing number of American states and European countries.**

53. In 2008, California became the first state to ban all restaurant food with artificial trans fat, a law affecting approximately 88,000 eating establishments. Trans fats are now banned in restaurants as of January 1, 2010 and will be removed from retailers starting January 1, 2011.

54. New York City banned all trans fat in its 20,000 food establishments in 2006. Similar laws exist in Philadelphia; Baltimore; Stamford, Connecticut; and Montgomery County, Maryland.

55. A 2004 Danish law restricted all foods to under 2 percent of calories from trans fat, a standard none of the Kellogg products described below meet. Switzerland made the same restriction in 2008.<sup>32</sup>

56. After conducting a surveillance study of Denmark's trans fat ban, researchers concluded the change "did not appreciably affect the quality, cost or availability of food" and did not have "any noticeable effect for the consumers."<sup>33</sup>

57. In 2006, a trans fat task force co-chaired by Health Canada and the Heart and Stroke Foundation of Canada recommended capping trans fat content at 2 percent of calories for tub margarine and spreads and 5 percent for all other foods. On September 30, 2009, British Columbia became the first province to impose these rules on all restaurants, schools, hospitals, and special events.<sup>34</sup>

58. In summary, Kellogg's supposedly healthy products have so much toxic artificial trans fat they would be illegal to sell in many parts of the world.

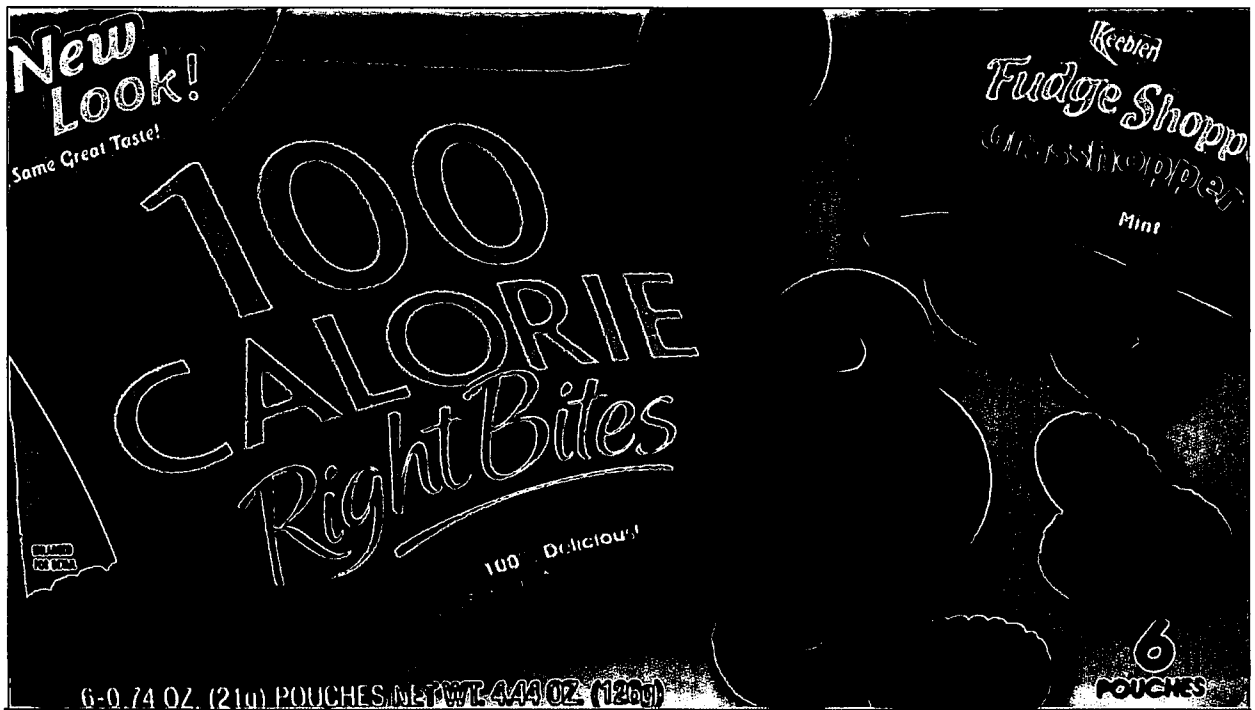
**SPECIFIC MISREPRESENTATIONS, MATERIAL OMISSIONS AND DECEPTIVE ACTS**

<sup>32</sup> Andrew Collier, *Deadly Fats: Why Are We still Eating Them?*, The Independent (UK), June 10, 2008.

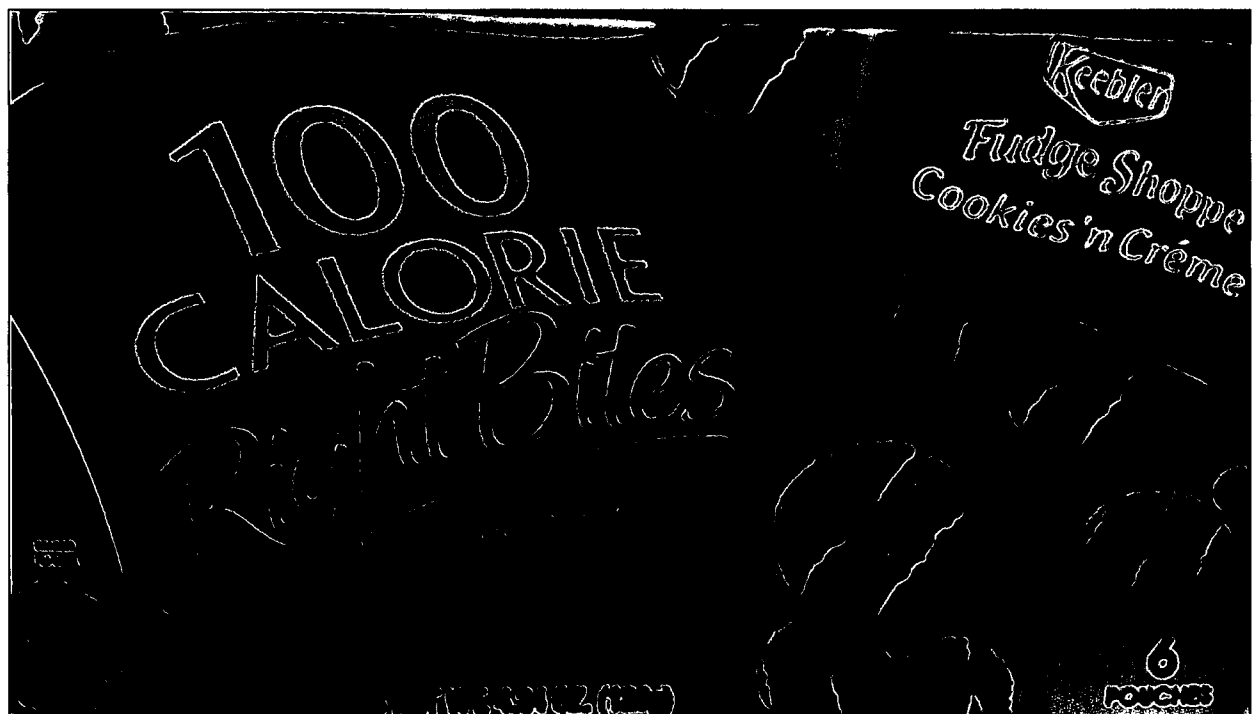
<sup>33</sup> Mozaffarian, 354 New Eng. J. Med. at 1610; *see also* High Levels of Industrially Produced Trans Fat in Popular Fast Food, 354 New Eng. J. Med. 1650, 1652 (2006).

<sup>34</sup> *Province Restricts Trans Fat in B.C.*, British Columbia Ministry of Healthy Living and Sport Press Release (2009), available at [http://www2.news.gov.bc.ca/news\\_releases\\_2005-2009/2009HLS0013-000315.htm](http://www2.news.gov.bc.ca/news_releases_2005-2009/2009HLS0013-000315.htm).

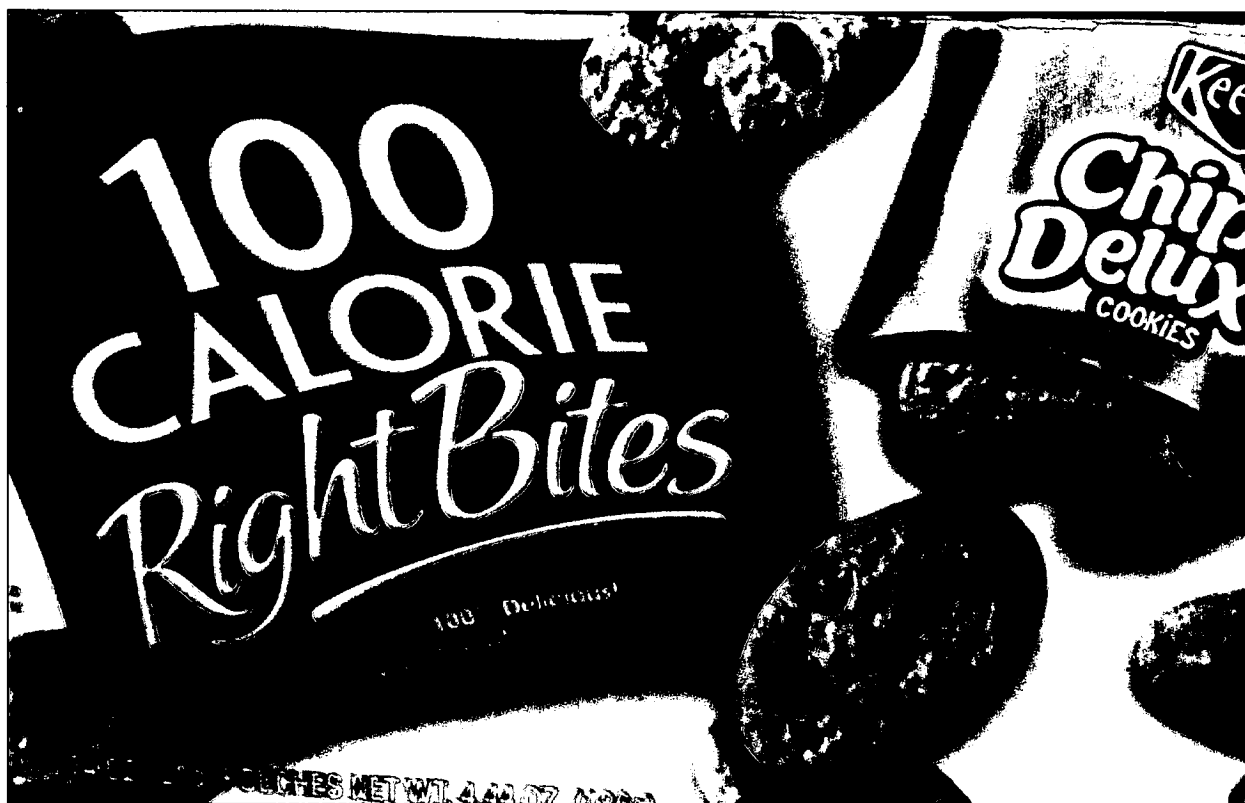
**Keebler 100 Calorie Right Bites Fudge Shoppe Grasshopper Cookies**



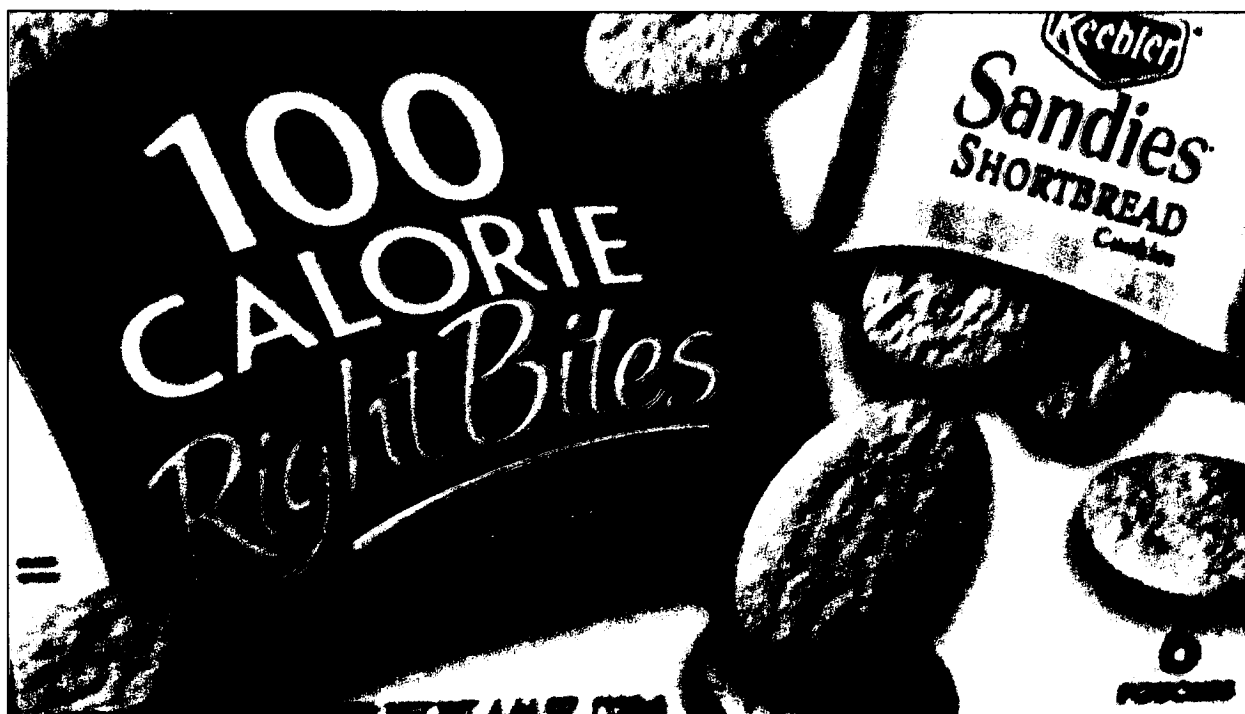
**Keebler 100 Calorie Right Bites Fudge Shoppe Cookies 'n Crème**



**Keebler 1000 Calorie Right Bites Chip Deluxe Cookies**

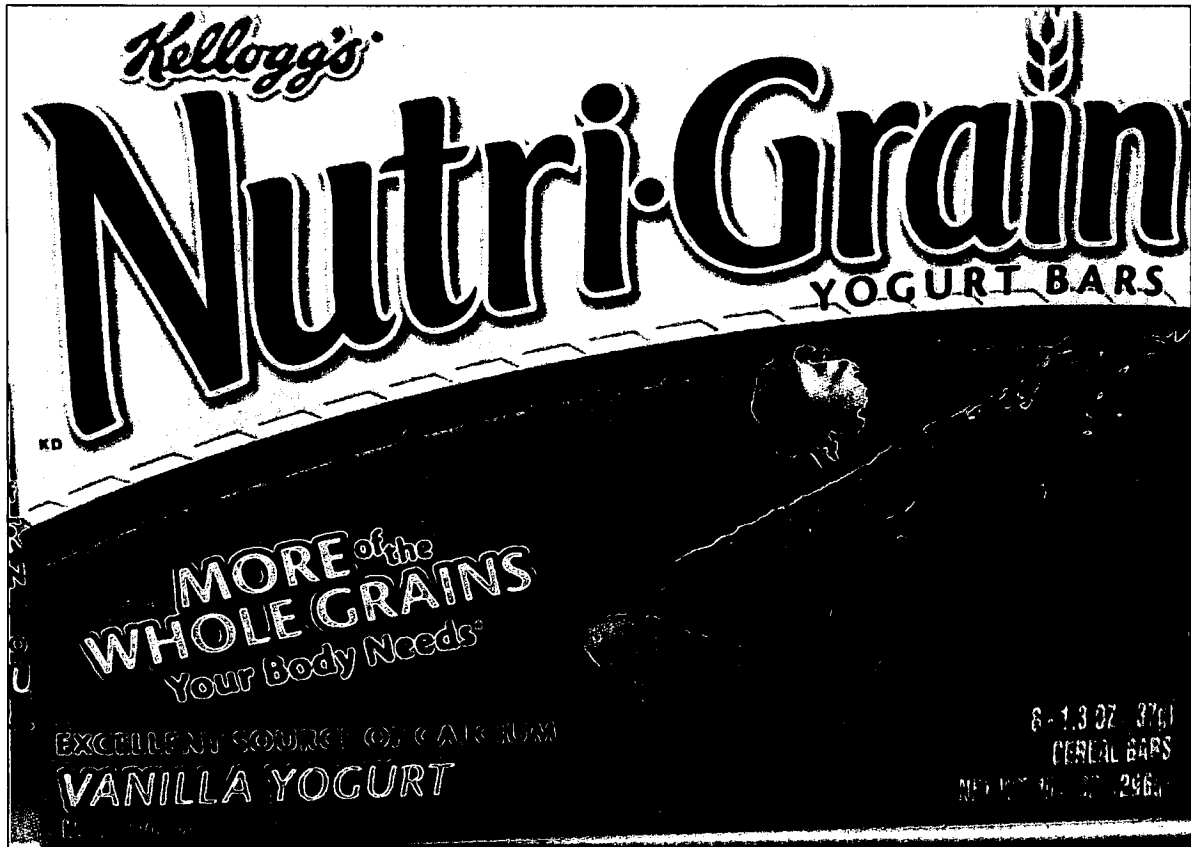


Keebler 100 Calorie Right Bites Sandies Shortbread Cookies

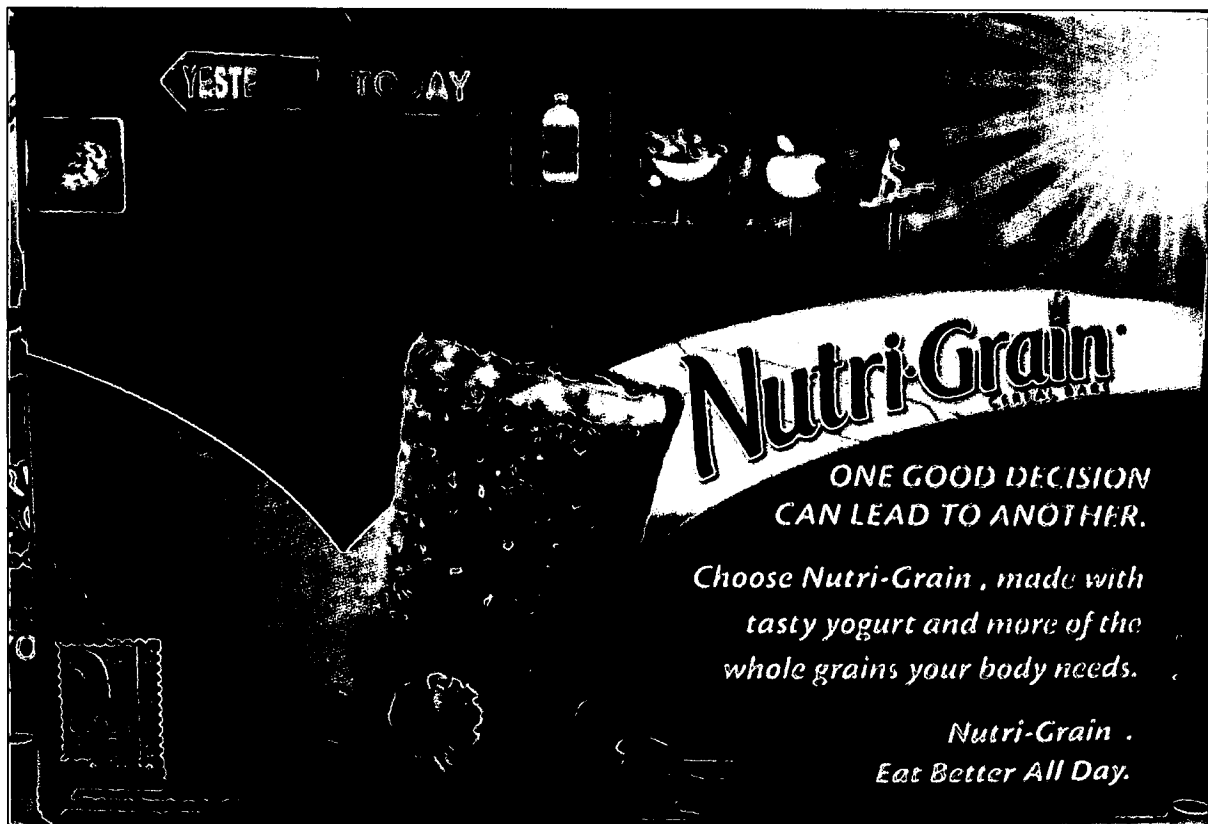


59. **False and misleading 0g trans fat claims:** The front labels of the Keebler 100 Calorie Right Bites products advertise "0g Trans Fat." The actual content of trans fat per serving is not "0g" and is deceptively omitted.

**Nutri-Grain Bars**



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60. **Misleading Packaging:** Kellogg misleads consumers into believing that Nutri-Grain Bars are healthy by making misleading claims on the product packaging. Such statements include "Excellent Source of Calcium," "More of the Whole Grains Your Body Needs," and "Eat Better All Day." Though possibly true, these statements are deceptive in intent and nature: they imply that these products are healthy despite the fact that they contain artificial trans fat, a toxic additive that causes heart disease, cancer, and type-2 diabetes.

61. The package of Nutri-Grain Bars pictured above has an image of a verdant field and an image of a Nutri-Grain Bar next to an image of a water bottle, a salad, an apple, and a person exercising. The obvious implication of this is that Nutri-Grain Bars are, like water, apples, salads, and exercising, part of a healthy lifestyle. In fact, Nutri-Grain Bars contain artificial trans fat, which renders the product unfit for human consumption.

62. **False and Misleading "Good Decision" Claim:** The package of Nutri-Grain Bars bears the phrase "ONE GOOD DECISION CAN LEAD TO ANOTHER." The obvious implication is that eating Nutri-Grain Bars is a good decision for one's health. In fact, the trans fat content of Nutri-Grain Bars renders the product dangerous and unfit for human consumption.

63. **False and Misleading "Nutri-Grain. Eat Better All Day." Claim:** The Nutri-



1 Grain Bar package bears the phrase "Nutri-Grain Bar. Eat Better All Day." with the obvious  
2 implication being that to eat a Nutri-Grain Bar is to "Eat Better." In fact, the trans fat content of  
3 Nutri-Grain Bars renders the product dangerous and unfit for human consumption.

4 **CLASS ACTION ALLEGATIONS**

5 64. Plaintiffs bring this action on behalf of themselves and all others similarly situated  
6 (the "Class") in accordance with Rule 23 of the Federal Rules of Civil Procedure.

7 65. The Class is defined as:

8 All persons (excluding officers, directors, and employees of Kellogg) who  
9 purchased, on or after January 1, 2000, one or more Kellogg products containing  
10 artificial trans fat for their own use rather than resale or distribution.

11 66. Questions of law and fact common to Plaintiffs and the Class include:

- 12 a. Whether Kellogg contributed to, committed, and/or is responsible for the  
13 conduct alleged herein;
- 14 b. Whether Kellogg's conduct constitutes the violations of law alleged herein;
- 15 c. Whether Kellogg acted willfully, recklessly, negligently, or with gross  
16 negligence in the violations of law alleged herein; and
- 17 d. Whether Class members are entitled to compensatory, injunctive, and other  
18 equitable relief.

19 67. By purchasing and/or using these products, all Class members were subjected to  
20 the same wrongful conduct.

21 68. Plaintiffs' claims are typical of the Class's claims. Plaintiffs will fairly and  
22 adequately protect the interests of the Class, have no interests that are incompatible with the  
23 interests of the Class, and have retained counsel competent and experienced in class litigation.

24 69. The Class is sufficiently numerous, as it includes hundreds of thousands of  
25 individuals who purchased Kellogg products throughout the United States.

26 70. Class representation is superior to other options for the resolution of the  
27 controversy. The relief sought for each Class member is small. Absent the availability of class  
28 action procedures, it would be infeasible for Class members to redress the wrongs done to them.

29 71. Kellogg has acted on grounds applicable to the Class, thereby making final  
30 injunctive relief or declaratory relief concerning the Class as a whole appropriate.

31 72. Questions of law and fact common to the Class predominate over any questions  
32



1 affecting only individual members.

2 **Kellogg fraudulently concealed the health hazards of consuming its products.**

3  
4 73. Kellogg has tolled any applicable statute of limitations by affirmatively  
5 concealing and publically misrepresenting its violations of law as described herein. A reasonable  
6 consumer would have relied on the deceptive and false claims made on the packaging of Kellogg  
7 products, and through the exercise of reasonable diligence would not have discovered the  
8 violations alleged herein because Kellogg actively and purposefully concealed the truth  
9 regarding its products.

10 **FIRST CAUSE OF ACTION**

11 **False Advertising under the Lanham Act, 15 U.S.C. § 1125 *et seq.***

12 74. Plaintiffs reallege and incorporate the allegations elsewhere in the Complaint as if  
13 set forth in full herein.

14 75. Kellogg has made and distributed, in interstate commerce and in this District,  
15 products that make false or misleading statements of fact regarding their content. All of the  
16 products described herein were placed into interstate commerce by Kellogg and sold throughout  
17 the country and this District.

18 76. These products contain on their labels actual misstatements and/or misleading  
19 statements and failures to disclose, including, among others, the statement that such products  
20 contain "0g" trans fat.

21 77. These false and/or true, but misleading statements and omissions actually deceive,  
22 or have a tendency to deceive, any reasonable consumer. This deception is material in that it is  
23 likely to influence the purchasing decision of a reasonable consumer.

24 78. Plaintiffs seek an order directing Kellogg to destroy all misleading and deceptive  
25 advertising materials and products in accordance with 15 U.S.C. § 1118.

26 79. Plaintiffs further seek an injunction under 15 U.S.C. § 1116 restraining Kellogg,  
27 its agents, employees, representatives, and all persons acting in concert with Kellogg from  
28 engaging in further acts of false advertising, and ordering removal of all of Kellogg's false  
29 advertisements and products possessing misleading statements or omissions of fact.

30 **SECOND CAUSE OF ACTION**

31 **Violations of the California Unfair Competition Law,  
32 Bus. & Prof. Code § 17200 *et seq.*, and  
the Common Law of Unfair Competition**

1 80. Plaintiffs reallege and incorporate the allegations elsewhere in the Complaint as if  
2 set forth in full herein.

3 81. Bus. & Prof. Code § 17200 prohibits any “unlawful, unfair or fraudulent business  
4 act or practice.”

5 82. The acts, omissions, misrepresentations, practices, and non-disclosures of Kellogg  
6 as alleged herein constitute “unlawful” business acts and practices in that Kellogg’s conduct  
7 violates the Lanham Act, the False Advertising Law and the Consumer Legal Remedies Act.

8 83. The acts, omissions, misrepresentations, practices, and non-disclosures of Kellogg  
9 as alleged herein constitute “unfair” business acts and practices in that Kellogg’s conduct is  
10 immoral, unscrupulous, and offends public policy. Further, the gravity of Kellogg’s conduct  
11 outweighs any conceivable benefit of such conduct.

12 84. The acts, omissions, misrepresentations, practices, and non-disclosures of Kellogg  
13 as alleged herein constitute “fraudulent” business acts and practices in that Kellogg’s conduct  
14 has a tendency to deceive both the Class members and the general public.

15 85. By violating the California Unfair Competition Law, Kellogg also violated the  
16 common law of unfair competition.

17 86. In accordance with Bus. & Prof. Code § 17203, Plaintiffs seek an order enjoining  
18 Kellogg from continuing to conduct business through unlawful, unfair, and/or fraudulent acts and  
19 practices and to commence a corrective advertising campaign.

20 87. Plaintiffs further seek an order for the disgorgement and restitution of all monies  
21 from the sale of these products, which were acquired through acts of unlawful, unfair, and/or  
22 fraudulent competition.

23 **THIRD CAUSE OF ACTION**

24 **Violations of the California False Advertising Law,**  
25 **Bus. & Prof. Code § 17500 *et seq.***

26 88. Plaintiffs reallege and incorporate the allegations elsewhere in the Complaint as if  
27 set forth in full herein.

28 89. In violation of Bus. & Prof. Code § 17500 *et seq.*, the advertisements, labeling,  
29 policies, acts, and practices described herein were designed to, and did, result in the purchase and  
30 use of the products without the knowledge that these products contain toxic artificial trans fat.

31 90. Kellogg either knew or reasonably should have known that the labels on these  
32 products were untrue and/or misleading.

1           91. As a result, Plaintiffs, the Class, and the general public are entitled to injunctive  
2 and equitable relief, restitution, and an order for the disgorgement of the funds by which Kellogg  
3 was unjustly enriched.

4                                   **FOURTH CAUSE OF ACTION**

5                                   **Violations of the Consumer Legal Remedies Act,**  
6                                   **Civ. Code § 1750 *et seq.***

7           92. Plaintiffs reallege and incorporate the allegations elsewhere in the Complaint as if  
8 set forth in full herein.

9           93. The CLRA prohibits deceptive practices in connection with the conduct of a  
10 business that provides goods, property, or services primarily for personal, family, or household  
11 purposes.

12           94. Kellogg's policies, acts, and practices were designed to, and did, result in the  
13 purchase and use of the products primarily for personal, family, or household purposes, and  
14 violated and continue to violate the following sections of the CLRA:

- 15                   a. § 1770(a)(5): representing that goods have characteristics, uses, or benefits  
16                   which they do not have.  
17                   b. § 1770(a)(7): representing that goods are of a particular standard, quality, or  
18                   grade if they are of another.  
19                   c. § 1770(a)(9): advertising goods with intent not to sell them as advertised.  
20                   d. § 1770(a)(16): representing the subject of a transaction has been supplied in  
21                   accordance with a previous representation when it has not.

22           95. As a result, Plaintiffs and the Class have suffered irreparable harm and are entitled  
23 to injunctive relief and restitution.

24           96. In compliance with Civ. Code § 1782, Plaintiffs have given written notice to  
25 Kellogg of their claims.

26                                   **PRAYER FOR RELIEF**

27           WHEREFORE, Plaintiffs, on behalf of themselves, all others similarly situated, and the  
28 general public, pray for judgment and relief against Kellogg as follows:

- 29                   A. Declaring this action to be a proper class action.  
30                   B. An order enjoining Kellogg from marketing its products that contain artificial  
31                   trans fat as "no trans fat" and/or "0g trans fat";  
32                   C. An order compelling Kellogg to conduct a corrective advertising campaign to

1 inform the public that its products contain unsafe amounts of trans fat at consumers' actual  
2 consumption levels.

3 D. An order requiring Kellogg to disgorge all monies, revenues, and profits obtained  
4 by means of any wrongful act or practice.

5 E. An order compelling Kellogg to destroy all misleading and deceptive advertising  
6 materials and products as provided by 15 U.S.C. § 1118.

7 F. An order requiring Kellogg to pay restitution to restore all funds acquired by  
8 means of any act or practice declared by this Court to be an unlawful, unfair, or fraudulent  
9 business act or practice, untrue or misleading advertising, or a violation of the CLRA, plus pre-  
10 and post-judgment interest thereon;

11 G. Costs, expenses, and reasonable attorneys' fees;

12 H. Any other and further relief the Court deems necessary, just, or proper.

13 **JURY DEMAND**

14 Plaintiffs demand a trial by jury on all causes of action so triable.

15 DATED: February 1, 2010

Respectfully Submitted,

16   
17

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19 THE WESTON FIRM  
20 888 Turquoise Street  
21 San Diego, CA 92109  
22 Telephone: 858 488 1672  
23 Facsimile: 480 247 4553  
24 greg@westonfirm.com

25 Jared H. Beck  
26 BECK & LEE BUSINESS TRIAL  
27 LAWYERS  
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30 Telephone: 305 789 0072  
31 Facsimile: 786 664 3334  
32 jared@beckandlee.com

Counsel for Plaintiffs

JS 44 (Rev. 12/07)

## CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

## I. (a) PLAINTIFFS

June Higginbotham and Jennifer Red, on  
Behalf of Themselves and All Others Similarly  
Situating

(b) County of Residence of First Listed Plaintiff San Diego, CA  
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Gregory S. Weston, The Weston Firm, LLC  
Turquoise Street, San Diego, CA 92109, (619) 488 1672

## DEFENDANTS

10 FEB 1 PM 3:49

CLERK U.S. DISTRICT COURT  
County of Residence of First Listed Defendant New Castle, DE  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, STATE THE LOCATION OF THE  
LAND INVOLVED.

Attorneys (If Known)

'10 CV - 255

MMA WVG

## II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff  
☒ 3 Federal Question (U.S. Government Not a Party)  
☐ 2 U.S. Government Defendant  
☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

## III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |   |                            |                            |   |                            |                            |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
|   | PTF                        | DEF                        |   | PTF                        | DEF                        |
| Citizen of this State                   | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business in this State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State                | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business in Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

## IV. NATURE OF SUIT (Place an "X" in One Box Only)

<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<b>PERSONAL INJURY</b> <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input checked="" type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	<b>PRISONER PETITIONS</b> <input type="checkbox"/> 510 Motions to Vacate Sentence <b>Habeas Corpus:</b> <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	<b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act <b>IMMIGRATION</b> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395f) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	

## V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding  
☐ 2 Removed from State Court  
☐ 3 Remanded from Appellate Court  
☐ 4 Reinstated or Reopened  
☐ 5 Transferred from another district (specify)  
☐ 6 Multidistrict Litigation  
☐ 7 Appeal to District Judge from Magistrate Judgment

## VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):  
15 USC § 1125 et seq., Bus & Prof Code § 17200, Bus & Prof Code § 17500, Civ Code § 1750

Brief description of cause:  
Deceptive Acts and Practices

## VII. REQUESTED IN COMPLAINT:

☒ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

to be determined at trial

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

## VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

2-1-10

SIGNATURE OF ATTORNEY OF RECORD

Greg Weston

FOR OFFICE USE ONLY

RECEIPT #

9733

AMOUNT

\$350-

APPLYING IFP

JUDGE

MAG. JUDGE

FB 02-01-10

DUPLICATE

Court Name: USDC California Southern  
Division: 3  
Receipt Number: CAS009733  
Cashier ID: mbain  
Transaction Date: 02/01/2010  
Payer Name: GREGORY WESTON

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CIVIL FILING FEE  
For: HIGGINBOTHAM VS  
Case/Party: D-CAS-3-10-CV-000255-001  
Amount: \$350.00

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CREDIT CARD  
Amt Tendered: \$350.00

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Total Due: \$350.00  
Total Tendered: \$350.00  
Change Amt: \$0.00

There will be a fee of \$45.00  
charged for any returned check.